

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 25, 2009 Session

**CHEATHAM COUNTY by and through its Floodplain Administrator, A. M.
Armstrong v. JAMES KONG, ET AL.**

**Direct Appeal from the Chancery Court for Cheatham County
No. 13862 Robert E. Burch, Chancellor**

No. M2008-01914-COA-R3-CV - Filed June 30, 2009

Appellee was issued a building permit for a carport by Appellant, County. County subsequently revoked the permit and ordered demolition of the carport claiming the structure exceeded that permitted. Appellee failed to demolish the structure, and County sued in the chancery court. Appellee moved to dismiss for lack of subject matter jurisdiction, claiming that he should be allowed to exhaust his administrative remedies—an appeal to the Board of Zoning Appeals—before the chancery court could assume jurisdiction. The trial court granted Appellee’s motion to dismiss. We find the chancery court had subject matter jurisdiction over the case, and thus, reverse and remand to the chancery court for a trial on the merits.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed and
Remanded**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Benjamin H. Perry, Ashland City, TN, for Appellant

William B. Herbert, IV, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

On April 17, 2007, James Kong (“Appellee” or “Mr. Kong”) was issued a building permit for the construction of a detached carport (the “Structure”) within the floodplain at 1442 Chapmansboro Road in Cheatham County, Tennessee. According to Cheatham County (“Appellant” or “County”), Mr. Kong “represented that the structure would consist of four (4) to six (6) poles supporting a metal roof, have a rock/gravel floor, and there would be no utilities in the structure.” County states that a June 2007 review of Mr. Kong’s building permit file “indicated that the proposed structure might require possible remediation to comply with applicable regulations.” Therefore, County sent Mr. Kong a letter on July 20, 2007,¹ stating that Mr. Kong’s property “may contain violations of the National Flood Insurance Program, FEMA, and [Flood Insurance Rate Map] FIRM requirements.” The letter instructed Mr. Kong that he “should complete the required mediation(s) to [his] property according to the enclosed FEMA remediation sheet.” However, the “remediation” section of the attached FEMA remediation sheet was left blank.² Subsequent to the July 20, 2007 letter, County’s Floodplain Administrator, A. M. Armstrong,³ explained to Mr. Kong that no remediation was required at the time because he had not yet begun construction of the Structure. However, Mr. Kong contends that construction of the Structure began in early June 2007.

According to County, a cease and desist order was posted on Mr. Kong’s property on January 10, 2008, “because the construction exceeded that permitted.” County claims that it received complaints that Mr. Kong was building a garage rather than a carport. County states that “[b]ecause the footings had been excavated and the concrete pad had been poured without the required inspections . . . certification of the inspections was now impossible[.]” Therefore, on January 30, 2008, the County sent Mr. Kong a letter revoking his building permit and ordering demolition of the structure within 90 days.

¹ County states that although “[t]he letter indicate[d] that the violations were noted during a visual tour of the county . . . this is believed to be a clerical error as it is believed that [Mr. Kong] did not begin construction of his project until late December of 2007 or early January of 2008.”

² The FEMA remediation sheet reads:

REMEDATION FEMA AUDIT JUNE 2007

LOCATION: MAP 441 PARCEL 31

ENTITY: JAMES KONG

FEMA: PANEL AE FLOODPLAIN

PROJECT: 30' x 40' DETACHED CARPORT 1200 SQ. FT.

REMEDATION:

WITHIN 30 DAYS (UNLESS EXTENSION GRANTED):

WITHIN 120DAYS (UNLESS EXTENSION GRANTED):

COUNTY ISSUES

SITE INSPECTION, ORIENTATION, VENTS IF INDICATED PHOTOS

³ The Cheatham County Floodplain Zoning Resolution authorizes the Floodplain Administrator to implement the provisions of the resolution.

On or about March 18, 2008, Mr. Kong met with County's Floodplain Administrator. The Floodplain Administrator agreed to visit the Structure with the FEMA Remediation Specialist, but after the visit decided to leave the order of demolition in force. Mr. Kong was notified of the decision via a letter dated May 13, 2008.⁴

Mr. Kong alleges that on June 17, 2008, he sent a letter to the Floodplain Administrator requesting that he be allowed to complete the carport, offering to have an engineer inspect the footings to ensure they complied with the codes, and notifying the Administrator that vents had been installed per the Administrator's instruction.⁵

County contends that after Mr. Kong received the May 13, 2008 letter and failed to take action, County was compelled to file a lawsuit against him on June 20, 2008, in the Cheatham County Chancery Court, seeking both an order restraining Mr. Kong from occupying or using the Structure and an injunction requiring Mr. Kong to remove the Structure. Thereafter, on June 25, 2008, Mr. Kong filed an application to appear before the Cheatham County Board of Zoning Appeals. County's Floodplain Administrator denied Mr. Kong's application.

On July 7, 2009, Mr. Kong filed a Motion to Dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(1), claiming that the chancery court lacked subject matter jurisdiction. Mr. Kong argued that before the chancery court could assume jurisdiction, Mr. Kong must be allowed to exhaust his administrative remedies—an appeal to the Board of Zoning Appeals. Mr. Kong further argued that the Floodplain Administrator had no authority to deny his application to appear before the Board of Zoning Appeals.

After a hearing on Mr. Kong's motion, the chancery court entered an Order finding "that it d[id] not have jurisdiction to hear th[e] matter; that the parties did not pursue their administrative remedies prior to coming to court; and that the Cheatham County Board of Zoning Appeals has jurisdiction to hear appeals related to construction issues." Therefore, the trial court dismissed the case and ordered County to accept Mr. Kong's appeal to the Board of Zoning Appeals.

On August 19, 2008, the County filed a motion to stay the court's order pending an appeal, which was granted on August 25, 2008. County timely filed its Notice of Appeal to this Court on August 19, 2008.

⁴ County claims that this letter was sent in response to a letter received from Mr. Kong on or about March 18, 2008.

⁵ County apparently claims that Mr. Kong sent this letter twice. County maintains that the letter Mr. Kong claims to have sent on June 17, 2008, contained identical language to a letter County received from Mr. Kong on or about March 18, 2008. Moreover, County claims that it did not receive the "June 17, 2008" letter until approximately June 25, 2008, after County filed suit against Mr. Kong.

II. ISSUES PRESENTED

County has timely filed its notice of appeal and presents the following issue for review:

1. Whether the trial court, in granting Defendant's Motion to Dismiss for lack of subject matter jurisdiction, erred in finding that:
 - A. The Chancery Court did not have subject matter jurisdiction to hear a lawsuit seeking equitable relief relating to a parcel of real property located within Cheatham County, Tennessee;
 - B. The parties did not pursue their administrative remedies prior to coming to court; and
 - C. The Cheatham County Board of Zoning Appeals has jurisdiction to hear appeals related to the construction issues in this matter.

Additionally, Mr. Kong presents the following issue for review:

2. Whether an administrative official has the authority to deny an aggrieved person's application to appeal to the Board of Zoning Appeals.

For the following reasons, we reverse the decision of the chancery court and remand for a trial on the merits.

III. STANDARD OF REVIEW

The determination of whether subject matter jurisdiction exists is a question of law. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000) (citing *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999)). Therefore, our review is de novo, without a presumption of correctness. *Id.* (citing *Nelson*, 8 S.W.3d at 628).

IV. DISCUSSION

On appeal, County asserts that the chancery court erred in granting Mr. Kong's Motion to Dismiss, finding that it lacked subject matter jurisdiction, that the parties did not pursue their administrative remedies prior to coming to court, and that the Board of Zoning appeals, rather than the chancery court, had jurisdiction over the case. We address whether the chancery court properly had jurisdiction below.

County claims that because its suit sought "equitable relief relating to a parcel of real property[.]" the chancery court properly had jurisdiction. In support of this argument, County cites Tennessee Code Annotated section 16-11-101, which vests in chancery courts "all the powers,

privileges, and jurisdiction properly and rightfully incident to a court of equity.” County further cites Tennessee Code Annotated section 16-11-102(a), which provides:

(a) The chancery court has concurrent jurisdiction, with the circuit court, of all civil causes of action, triable in the circuit court, except for unliquidated damages for injuries to person or character, and except for unliquidated damages for injuries to property not resulting from a breach of oral or written contract; and no demurrer for want of jurisdiction of the cause of action shall be sustained in the chancery court, except in the cases excepted.

Tenn. Code Ann. § 16-11-102(a) (1994).

County also claims that the commencement of its action in the chancery court was authorized by Tennessee Code Annotated section 13-7-111, which provides, in relevant part:

It is unlawful to erect, construct, reconstruct, alter, maintain or use any building or structure or to use any land in violation of any regulation in any provision of any ordinance or any amendment thereof enacted or adopted by any county legislative body under the authority of this part. . . . In case any building or structure is or is proposed to be erected, constructed, altered, maintained or used or any land is or is proposed to be used in violation of this part or of any regulation or provision enacted or adopted by any county legislative body under the authority granted by this part, such county legislative body, the attorney general and reporter, the district attorney general for the judicial district in which such violation occurs or is threatened, the county building commissioner or any adjacent or neighboring property owner who would be specially damaged by such violation, in addition to other remedies provided by law, *may institute injunction, mandamus, abatement or any other appropriate action, actions, proceeding or proceedings* to prevent, enjoin or abate or remove such unlawful erection, construction, reconstruction, alteration, maintenance or use.

Tenn. Code Ann. § 13-7-111 (1999) (emphasis added). Furthermore, County cites Section 8.100 of the Cheatham County Zoning Resolution (“Zoning Resolution”), which states:

In case any building or other structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure, or land is used, in violation of this resolution, the Director of the Building Department or any other appropriate authority or any adjacent or neighboring property owner who would be specifically damaged by such violation, in addition to other remedies, may institute an injunction, mandamus, or other appropriate action or proceeding to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use; or to correct or abate such violation; or to prevent occupancy of such building, structure, or land.

County claims that Tennessee Code Annotated section 13-7-111 and Section 8.100 of the Zoning Resolution confer jurisdiction upon the chancery court; however, County further asserts that because neither requires that “violators must, or should, be allowed to exhaust any or all administrative remedies available to them prior to an action being brought against them pursuant to [the statute or the Zoning Resolution,]” exhaustion of remedies is not a prerequisite to the chancery court gaining jurisdiction.

Mr. Kong, however, maintains that “subject matter jurisdiction for alleged zoning violations is initially vested with the Cheatham County Board of Zoning Appeals pursuant to Tennessee Code Annotated [section] 13-7-109(1) and [section] 5.075 of the . . . Zoning Resolution.” Tennessee Code Annotated section 13-7-109, concerning county zoning, provides that

The board of appeals has the power to:

(1) Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by the county building commissioner or any other administrative official in the carrying out or enforcement of any ordinance enacted pursuant to this part[.]

Tenn. Code Ann. § 13-7-109 (1999). Section 5.075 of the Zoning Resolution states that in “areas of special flood hazard,” the Board of Zoning Appeals “shall hear and decide appeals and requests for variances from the requirements of this article.” Furthermore, Tennessee Code Annotated section 13-7-108 allows appeals to the board of appeals “by any person aggrieved . . . by any grant or withholding of a building permit or by any other decision of a building commissioner or other administrative official, based in whole or in part upon the provision of any ordinance under this part.” **Tenn. Code Ann. § 13-7-108 (1999).** Mr. Kong claims that because he is alleging that the Floodplain Administrator erred in enforcing the Zoning Resolution, the Board of Zoning Appeals properly has jurisdiction.

Mr. Kong also contends that the chancery court could, in its discretion, require Mr. Kong to exhaust his administrative remedies before assuming jurisdiction. In *B.F. Nashville, Inc. v. City of Franklin*, No. M2003-00180-COA-R3-CV, 2005 WL 127082 (Tenn. Ct. App. 2005), the middle section of this Court explained when the exhaustion of administrative remedies is required. The Court stated:

In applying the doctrine of exhaustion of administrative remedies, courts must determine whether a statute provides an administrative remedy. If a statute explicitly provides an administrative remedy, a party must exhaust this remedy prior to seeking relief from the courts. *Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 566 (Tenn. 1997); *Bracey v. Woods*, 571 S.W.2d 828, 829 (Tenn. 1978); *Tennessee Enamel Mfg. Co. v. Hake*, 183 Tenn. 615, 194 S.W.2d 468 (1946). It has long been settled that where an administrative procedure is provided by statute, a party claiming to have been injured must comply with that procedure before resorting to court. *State*

v. Yoakum, 201 Tenn. 180, 193, 297 S.W.2d 635 (1956); *State ex rel. Jones v. City of Nashville*, 198 Tenn. 280, 279 S.W.2d 267, 283 (Tenn. 1955). However, exhaustion is not statutorily required unless the statute “by its plain words” requires it. *Thomas*, 940 S.W.2d at 566; *Reeves v. Olsen*, 691 S.W.2d 527, 530 (Tenn. 1985).

In the situation where the legislature has provided more than one method to obtain judicial review, one of which involves administrative action or levels of appeal, exhaustion of administrative remedies is not statutorily required. *Reeves*, 691 S.W.2d at 530[.] . . .

When not mandated by statute, the question of whether to require a party to exhaust available administrative remedies is a matter of judicial discretion. *Thomas*, 9[40] S.W.2d at 566 n.5; *Reeves*, 691 S.W.2d at 530. . . .⁶

Id. at *5. In *B.F. Nashville, Inc.*, the City Sign Codes Administrator ordered B.F. to remove the support posts for its former sign and disallowed reconstruction of the sign. 2005 WL 127082, at *1. B.F. filed a complaint for a declaratory judgment in the chancery court alleging that it had a statutory right to reconstruct the sign. *Id.* The city filed a motion to dismiss based on B.F.’s failure to exhaust its administrative remedies by appealing to the Board of Zoning Appeals. *Id.* at *2. The chancery court granted the city’s motion, and the Court of Appeals affirmed. *Id.* at *2, 11. The Court noted that “[a] party cannot bypass administrative decision makers and then seek to avoid that standard of review applicable to common law writ of certiorari because there is no record of proceedings below and no administrative or quasi judicial decision made.” *Id.* at *7.

Mr. Kong also cites *State ex rel. Moore & Assocs. Inc. v. West*, 246 S.W.3d 569, 577 (Tenn. Ct. App. 2005), in support of his contention that it was within the trial court’s discretion to require Mr. Kong to exhaust his administrative remedies. In *Moore*, Moore & Associates, during the construction of a hotel, erected a landscape buffer which did not comply with the zoning code. *Id.* at 572. Moore & Associates applied for a variance, but its request was denied. *Id.* After substantial completion of the hotel, the Zoning Administrator refused to issue a certificate of compliance. *Id.* at 573. Thereafter, Moore & Associates brought suit in the trial court seeking a declaratory judgment declaring the buffer to be in compliance and requiring the Zoning Administrator to issue a certificate of compliance. *Id.* The trial court granted Moore & Associates’ motion for summary judgment, and maintained the buffer’s compliance. *Id.* On appeal, the government argued that Moore & Associates could not bypass the administrative remedies in order to avoid the standard of review afforded to administrative decisions. *Id.* at 574. This Court agreed, and held that Moore & Associates was required to exhaust its administrative remedies by appealing to the Board of Zoning Appeals. *Id.* at 579. The Court noted that “[t]he administrative process had begun by virtue of the request for the certificate of compliance” and that “the Board should have been given the opportunity

⁶ “There are exceptions to the exhaustion requirement.” *B.F. Nashville, Inc.*, 2005 WL 127082, at *6. For example, a party is not required to seek administrative review when challenging the validity of a statute or ordinance, when raising only questions of law, and when such review would be futile. *Id.* (citations omitted).

to apply its experience and expertise to the issue and to correct any errors it found in the administrator's decision[.]" *Id.*

Mr. Kong also cites *State ex rel. Poteat v. Bowman*, 491 S.W.2d 77 (Tenn. 1973). In *Poteat*, an unsuccessful applicant for a building permit sought a writ of mandamus in the chancery court to compel issuance. *Id.* at 77. The applicant claimed that he had made no appeal to the Board of Zoning Appeals, as the reasons for denying the permit were purely legal, and the Board lacked authority to determine such. *Id.* at 79. Our Supreme Court affirmed the trial court's dismissal for failure to exhaust administrative remedies. *Id.* at 80. The Court stated that review by the Board could be bypassed where the petitioner challenges the constitutionality of an ordinance; however, a petitioner cannot seek relief under an ordinance and, at the same time, avoid such ordinance's "administrative machinery[.]" *Id.*

Finally, Mr. Kong relies on *Thomas v. State Board of Equalization*, 940 S.W.2d 563 (Tenn. 1997) and *Reeves v. Olsen*, 691 S.W.2d 527 (Tenn. 1985). In *Thomas*, our Supreme Court stated that "[w]hen not mandated by statute, exhaustion is a matter of judicial discretion[.]" 940 S.W.2d at 566 n.5, and found that Thomas was not required to appeal the tax assessment of her home before the assessment appeals commission instead of the trial court, when appeals to the commission were permissive rather than mandatory. 940 S.W.2d at 566. In *Reeves*, a donor sued to recover overpaid gift taxes resulting from an improper assessment. 691 S.W.2d at 528. The chancery court granted the donor a refund, but the Commissioner of Revenue appealed, alleging that the chancery court lacked subject matter jurisdiction as the donor had not exhausted her administrative remedies. *Id.* Our Supreme Court held that the donor was not required to exhaust her administrative remedies because the statute allowing appeals from appraisals "expressly authorize[d] alternative avenues of relief for the taxpayer." *Id.* at 530.

Based on our review of the applicable statutes, case law, and the Zoning Resolution, we find that the chancery court erred in dismissing County's suit for lack of subject matter jurisdiction. As we cited above, both Tennessee Code Annotated section 13-7-111 and Zoning Resolution 8.100 provide that when buildings or structures are erected in violation of the applicable regulations, certain persons may institute an injunction or any other appropriate action in order to remedy the violation. **See Tenn. Code Ann. § 13-7-111.** Mr. Kong has cited no applicable statute or resolution requiring exhaustion of administrative remedies before such actions may be taken. Thus, he does not argue that exhaustion is statutorily required, but instead, that this Court should defer to the trial court's decision to require exhaustion of Mr. Kong's administrative remedies.

We find the cases cited by Mr. Kong concerning exhaustion inapplicable to the instant case. In *Moore, B.F. Nashville, Inc.*, *Thomas*, and *Reeves*, the courts considered whether the *party instituting the action* in the trial court should first be required to exhaust its administrative remedies. Such is not the case here. Mr. Kong did not first file suit in the trial court. Rather, County, which had no further administrative remedies to exhaust, did. County was not attempting to avoid the standard of review given to administrative proceedings, but was seeking enforcement of its decision by one of the few means available. We find no requirement that the defending party be allowed to

exhaust its administrative remedies after the other party has initiated proceedings against it in the trial court. Furthermore, we find it inequitable to allow Mr. Kong to “cut off” County’s right to sue under Tennessee Code Annotated section 13-7-111 and Zoning Resolution 8.100 by filing an application to appeal with the Board of Zoning Appeals, only *after* the initiation of County’s suit. When, as here, the party initiating proceedings in the trial court has no further administrative remedies to exhaust, the trial court is not stripped of its subject matter jurisdiction when the defending party subsequently seeks administrative review. Therefore, we find that the chancery court had subject matter jurisdiction in this case, and, thus, erred in dismissing the suit.

V. CONCLUSION

For the aforementioned reasons, we reverse the decision of the chancery court and remand the case for trial on the merits. All remaining issues are pretermitted. Costs of this appeal are taxed to Appellee, James Kong, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.